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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 293

MRS. M. B. BUFORD, ET AL.,
Petitioners,

vs.

THE STATE OF TEXAS,
Respondent.

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES Respondent, the State of Texas, and respectfully files this its brief in opposition to the petition for writ of certiorari.

Statement of The Case

This case is a suit brought by Petitioners in the District Court of Travis County, Texas, 98th Judicial District, against the State of Texas, to re-

cover judgment on forty-six (46) bonds of the denomination of One Thousand Dollars ($1,000.00) each, or a total of Forty-six Thousand Dollars ($46,000.00), plus eight percent (8%) interest from January 1, 1862 to July 1, 1877.

Texas seceded from the Union on February 28, 1861. The bonds sued upon by Petitioners in this case constitute a part of an issue of One Million Dollars ($1,000,000.00) issued under an Act of the Legislature of April 8, 1861, and said bonds were issued by the State of Texas as a member of the Confederate States dated January 1, 1862, except bond No. 5 dated March 25, 1862, and under the Constitution of 1861 governing Texas as a member of the Confederacy. A copy of the bonds is attached to Petitioners' Petition filed in the trial court, and all the bonds are of like tenor.

Petitioners purport to file their suit under House Concurrent Resolution No. 44 of the 55th Legislature of the State of Texas, approved June 11, 1957.

The facts of this case are stated in the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, styled *Mrs. M. B. Buford, et al. v. The State of Texas*, 322 S. W. 2d 366, which opinion, including the two concurring opinions, is set forth in appendix attached to this brief and designated as Appendix A.

Proceedings Below

The District Court of Travis County, Texas, 98th Judicial District, entered a judgment sustaining Respondent's Special Exceptions Nos. 1, 2, 3, 4,

and 5, and overruled Petitioners' Special Exceptions. Upon Petitioners' refusal to amend, the District Court dismissed the cause.

The judgment of the Court of Civil Appeals affirmed the judgment of the District Court and denied Petitioners' motion for rehearing. The Supreme Court of Texas denied Petitioners' application for writ of error and overruled Petitioners' motion for rehearing.

Jurisdiction

It is questioned by Respondent that any substantial federal question is presented for adjudication by the Supreme Court of the United States. There is but one question: whether this Court will exercise its jurisdiction to decide whether the State Court of last resort has correctly interpreted and applied State laws.

Questions Presented

1. Will the Supreme Court of the United States grant certiorari in this case for the reason that Petitioners have asserted that the Fourteenth Amendment to the Constitution of the United States was not lawfully proposed and adopted?

2. Is Section 10, Article I of the United States Constitution, prohibiting the impairment of the obligations of contracts, involved in this case?; and

3. Is the construction of the Acts of the 47th Congress, Chapter 41, Section 1, approved June 27, 1882, Volume 22, United States Statutes at Large, page 111, with reference to reimbursement by the Federal Government of certain obligations of the States, involved in this case?

In summary, the sole question involved for this Court to decide is whether the judgment of the State Court below rests on adequate and independent grounds, without reference to the foregoing contentions of Petitioners of alleged federal questions.

Statutes Involved

The statutes involved are produced in the Appendix to this brief. (Appendix B and C)

Argument

As previously noted, this case was instituted by Petitioners to recover on certain so-called "Texian Loan Bonds" issued by the State of Texas after secession, and while Texas was a member of the Confederacy. The special exceptions filed by Respondent as defendant in the trial court are set out in the opinion of the Court of Civil Appeals attached as an appendix to this answer and brief (Appendix A), and are found on pages 18 to 21.

The first of these special exceptions is that Petitioners' suit was not filed in the time and manner provided by law, namely House Bill 309, Chapter 392 of the Acts of the 52nd Legislature, Regular Session, 1951, page 677 (Article 842(g), Vernon's

Texas Civil Statutes (Appendix B). For convenience we shall hereafter refer to this statute as House Bill 309. The second special exception was that Petitioners' suit was not filed in the time and manner provided by Article 5527, Vernon's Texas Civil Statutes, which provides in part that suits must be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterwards, if the action is for debt evidenced by or founded upon any contract in writing. (Appendix C). The third and fourth special exceptions set up laches and stale demand. The fifth special exception, while correctly sustained, is not important in the determination of the merits of this application, hence not further noted. The Court of Civil Appeals in this case stated affirmativly that it affirmed the judgment of the trial court sustaining Respondent's special exceptions 1, 2, 3, and 4, and dismissing the cause (Petitioners refused to amend), and the Court stated that it did not find it necessary to consider or decide whether the Fourteenth Amendment to the Federal Constitution was legally adopted or if any contract was impaired. (Appendix A, p. 29).

In 1951 the Legislature passed House Bill 309, codified in Vernon's Texas Civil Statutes as Article 842(g), which provided that all lawful holders of bonds issued under the Act of April 8, 1861, called "Texian Loan Bonds" might sue on said bonds for principal and interest within two years from the date of the Act. This Act further provided that the statute of limitations was not tolled nor any liability admitted, and that suit *shall* be brought in

Travis County within two years from the date of the Act. (Emphases throughout supplied unless otherwise indicated). (See Sections 2, 6 and 7 of House Bill 309, Appendix B). This Act, that is, House Bill 309, giving consent to all the bondholders to sue, became effective September 7, 1951. Petitioners' suit was filed July 31, 1957, nearly six years subsequent to the effective date of the Act. This affirmatively appears from the petition.

It is the law of this State that the defense of limitation is available to the State. *Callahan v. Giles*, 137 Tex. 571, 155 S.W. 2d 793, and cases cited therein; *Railroad Commission v. Beacon Oil & Refining Co.*, Tex. Civ. App., 227 S.W. 2d 293 error ref., n.r.e., and authorities and cases cited therein.

Moreover, Petitioners' cause of action, if any they had, was founded upon a contract in writing with the State. This affirmatively appears from the petition. The bonds matured on July 1, 1877, and Petitioners' suit was not filed until approximately 80 years later, hence is barred by the four-year statute of limitations of the State of Texas, and this was sustained by the State Court. This four-year statute of limitations is set out as Appendix C. Section 6 of House Bill 309, the general law, provides that the statute of limitations was not tolled or such cause revived if same was barred by the statute of limitations (House Bill 309, Appendix, B, page 38).

In relinquishing its sovereign immunity to be sued, the State may attach such conditions to the right as it deems appropriate. 38 Tex. Jur., Section 59, p. 660. *Treasurer v. Wygall*, 46 Tex. 447; *Hosner*

v. DeYoung, 1 Tex. 764; *State v. Elliott* (Civ.App.) 212 S.W. 695, error refused; *State v. Gulf Oil Corp.* (Civ.App. 1942); 166 S.W. 2d 197. (No writ history). Petitioners were obliged to file their suit, as the Legislature prescribed in House Bill 309, in Travis County, and within two (2) years from the effective date of the Act, September 7, 1951. They ultimately filed their suit in Travis County, but completely ignored the condition prescribed by the Legislature in House Bill 309, the general law, that it must be filed within two (2) years from the effective date of the Act, September 7, 1951. Whether intentionally or negligently, it makes no difference, the result is the same.

Petitioners seek to avoid the application of general law by Resolution, namely House Concurrent Resolution No. 44 (Appendix A, pp. 26-27), under which they purport to file their suit. The Courts of this State have held that a Resolution is not effective to repeal, modify, or amend a law. *Caples v. Cole*, 129 Tex. 370, 102 S.W. 2d 173, 104 S.W. 2d 3; *State Highway Dept. v. Gorham*, 139 Tex. 361, 162 S.W. 2d 934; *Humble Oil & Refining Co. v. State*, Tex. Civ. App., 104 S.W. 2d 174, error ref.

The State Court held that Petitioners were bound by the terms of House Bill 309, the general law, and Article 5527, Vernon's Texas Civil Statutes, also a general law, and that these general laws applied to Petitioners and their bonds. The Court of Civil Appeals affirmed this holding and judgment, and the Supreme Court of Texas refused writ of error. The Supreme Court of the United States has consistently held that the construction of State laws

is the exclusive responsibility of State Courts. *Knights of Pythias v. Meyer*, 265 U.S. 30, 32; *Hotel and R. Employee's International Alliance v. Wisconsin Employment Relations Bd.*, 315 U.S. 437, 438; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680; *Morehead v. New York*, 298 U.S. 587, 609; *Senn v. Tile Layers' Protective Union*, 301 U.S. 468, 477; *Moore v. Illinois Central R. Co.*, 312 U.S. 630, 633.

The application of laches and statutes of limitation by State Courts does not present a Federal question. *Preston v. Chicago, Ill.* 1913, 33 S.Ct. 177, 226 U.S. 447, 57 L.Ed. 293; *Seneca Nation v. Christy*, N.Y. 1896, 16 S.Ct. 828, 162, U.S. 28, 40 L.Ed. 970; *Harrison v. Myer*, La. 1876, 92 U.S. 111, 23 L. Ed. 606; *Corothers v. Mayer*, Mont. 1896, 17 S. Ct. 106, 164 U.S. 325, 41 L.Ed. 453; *Great Western Tel. Co. v. Purdy*, Iowa 1896, 16 S.Ct. 810, 162 U.S. 329, 40 .Ed. 986.

We turn now more specifically to laches and stale demand raised by Respondent's special exceptions 3 and 4. The Supreme Court of Texas, in the case of *Power v. State*, 41 Tex. 102, in passing upon a claim asserted against the State, held that a delay of 27 years in asserting the claim was barred by laches and stale demand as a matter of law. The last paragraph of the Court's opinion is brief, and we quote it:

> "We think no sufficient excuse is shown for the great delay in the prosecution of this claim, and that, even if the Act of 1846 were held to cure the delay up to that time, the lapse of

twenty-seven years after that date before filing this suit *is fatal to the case*, according to the *most liberal rules on that subject recognized in this court.*"

If a delay of 27 years is fatal, then what can be said in support of a delay of 80 years? To state the question is to answer it. It is elementary, and needs no citation of authority to support it, that the law favors the diligent and gives no comfort to the slothful and dilatory. Long delay in asserting a claim, whether it be against the State or private individuals, is indicative that the claim is without merit and unenforceable. 27 Tex.Jur., pages 15-18, where laches and stale demand are discussed.

It is significant to note that the Court of Civil Appeals in this case said:

> "If the holders of the bonds thought that they had a valid claim against the State, it may be assumed that the bonds would have been presented for payment and if payment had been wrongfully refused, the holders had the remedy of mandamus." (Appendix A, page 28 and 29).

Notwithstanding the existence of the remedy of mandamus available to Petitioners and their predecessors in title to the bonds for three quarters of a century, they ignored this remedy. The remedy of mandamus in the State of Texas in a proper case is simple. The Supreme Court of Texas has original jurisdiction under Article 1735, Vernon's Texas Civil Statutes, in actions against the executive officers of the State, except the Governor. The Comptroller of Public Accounts and the State Treasurer

are executive officers of the State of Texas under the Constitution. As stated in the opinion of the Court of Civil Appeals in this case, if Petitioners or their predecessors in title thought they had valid bonds they could have presented them to the State Treasurer for payment and, if wrongfully refused, mandamus would lie against him to require payment. This remedy has been completely ignored since the maturity of the bonds in 1877.

If the holders of these bonds, whoever they may have been, consider them valid obligations of the State, they should have asserted their claim at the time of their maturity and default, July 1, 1877, or within a reasonable time thereafter and not 80 years later. If they had valid bonds, as pointed out by the Court of Civil Appeals, the remedy of mandamus was available to them. Petitioners contention of the unavailability of a remedy is wholly untenable. The fiscal obligations of the states is not a casual matter with them. Sound public policy demands that they be kept current. It is hardly conceivable that there is presently living any person with any personal knowledge surrounding issues of these old bonds. Records are lost or become fragmentary and obscure over a period of 80 years. These are elements that compel the prompt assertion of claims, or lose the right by laches and stale demand. There could scarcely be conceived a case more appropriate for the application of the doctrine of laches and stale demand than is present in this case.

The bonds involved here, on which Petitioners seek to recover, were issued nearly a century ago

by the State of Texas as a State of the Confederacy, and matured by their express terms 80 years before Petitioners filed their suit.

It is presumed that the State is always ready to pay its legal obligations or make provision therefor. *Bankers Bond Co. v. Buckham*, 97 S.W. 2d 596 (Court of Appeals, Kentucky). The states are jealous of their credit, as indeed they should be. The Legislature met every two years and in many special sessions subsequent to the maturity of these bonds, July 1, 1877. If the Legislature had considered them valid it could have, and no doubt would have, paid them or made provision therefor long ago. No Legislature or Governor of the State at or subsequent to the maturity of these bonds has ever taken any recognition of them until the Legislature passed House Bill 309 in 1951 which, in effect, said to the holders of these bonds, notwithstanding their antiquity, you may sue upon them if you think they are valid obligations of the State, but this you must do within two years from the effective date of the Act, which Petitioners completely ignored. This they were not privileged to do over the State's exception.

Reverting to the non-recognition of these bonds by the Legislature and the Governors, and the absence of any assertion of a claim against the State upon them for a period of 80 years, it is significant to note that Governor Hubbard, who succeeded Governor Coke as Governor, on December 1, 1876 when Governor Coke resigned to enter the United States Senate, made a statement of the outstanding bonded indebtedness of the State in his initial message to the Legislature. He did not mention these bonds,

but mentioned others, and made recommendation to the Legislature to refund all bonds that matured in 1876 and 1877, which would embrace the date of the maturity of Petitioners' bonds, July 1, 1877. The Legislature obeyed Governor Hubbard's recommendation to refund all State bonds maturing in 1876 and 1877, but made no provision for the bonds authorized by the Act of April 8, 1861, of which Petitioners' bonds are a part. All of this is reflected by the public laws and records of this State. Thus, it is quite evident that neither the Governor nor the Legislature, contemporaneously with the maturity of these bonds, recognized them as valid obligations of the State. We think it must be concluded they were considered invalid and worthless.

Petitioners also seek to avoid the terms of House Bill 309 because of the phrase appearing therein, "prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States Government for the principal and interest on said bonds," contending that this phrase renders the Act inapplicable to them and their bonds. The State Court held otherwise, and this construction and application by the State Court will be followed by the Supreme Court of the United States as held in the decisions of the Supreme Court of the United States heretofore referred to. Moreover, as Justices Gray and Hughes observed in their concurring opinions, Petitioners could have had their contention in this respect judicially determined if they had timely filed their suit under House Bill 309 (Article 842 (g), Vernon's Texas Civil Statutes), which they did not do.

Furthermore, this phrase could be severed and laid aside, without in any manner, impairing the consent to sue *Martin v. Sheppard*, 145 Tex. 639, 201 S.W. 2d 810.

Moreover the act of Congress relied upon by petitioners for federal jurisdiction in this case, namely: Chapter 241, Sec. 1, of the Acts of the 47th Congress approved June 27, 1882, 22, U. S. Statutes at Large, page 111, affords no grounds for the assertion of any federal right in this case. Petitioners contention seems to be that because this act of Congress authorizing certain reimbursements to the states for Indian deprivations is silent on any other reimbursements by the federal government to the states, and that there is no other federal statute authorizing reimbursement, that this gives rise to a federal question. Petitioners do not attack the validity of House Bill 309, (Art. 842g), but merely say that there is no federal statute authorizing reimbursement by the federal government as to the bonds sued upon by petitioners in this case. Where the question is not as to the validity, but as to existence of an authority under the United States, a federal question is not presented. *Millingar v. Hartupee*, Pa. 1868, 6 Wall. 258, 18 L.Ed. 829. See also, *Walsh v. Columbus, etc., R. Co.*, Ohio 1900, 20 S.Ct. 393, 176 U.S. 469, 44 L.Ed. 548; *Hamblin v. Western Land Co.*, Iowa 1893, 13 S.Ct. 353, 147 U.S. 531, 37 L.Ed. 267; *New Orleans v. New Orleans Water Works Co.*, La. 1891, 12 S.Ct. 142, 142 U.S. 79, 35 L.Ed. 943.

Petitioners' contention with respect to the sufficiency of the submission and adoption of the Four-

teenth Amendment to the Federal Constitution and its application to this case is so far-fetched, obscure, and non-colorable, that it does not merit discussion. Suffice it to say that Petitioners complaint against the Fourteenth Amendment to the Federal Constitution should be addressed to the legislative branch of the Government which has authority and power in the premises, instead of the judicial branch which has none. As the Court of Civil Appeals in its opinion in this case (Appendix A), correctly and aptly said, "It is not necessary to consider or decide whether the Fourteenth Amendment to the Federal Constitution was legally adopted or whether any contract had been impaired as provided in the Federal Constitution by the invalidation of these bonds by the Texas Constitution of 1866 and 1869. The Court of Civil Appeals in this case based its decision and judgment upon Respondent's special exceptions numbered 1, 2, 3 and 4, which were by the trial court sustained; any one amply supports the judgment. Upon Petitioners' refusal to amend the cause was dismissed, as it should have been.

These special exceptions and the decision and judgment of the State Court are based upon the local or State law of the State of Texas, and rest upon adequate and independent grounds, hence will not be reviewed by the Supreme Court of the United States. *Black v. Cutter Laboratories*, 351 U.S. 292, 298; *Herb v. Pitcairn*, 324 U.S. 117, 125; *Klinger v. State of Missouri*, 13 Wall. U.S. 257, 263; *Murdock v. Memphis*, 20 Wall. U.S. 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Enterprise*

Irrig. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164; *Fox Film Corp. v. Muller*, 296 U.S. 207, 210.

Moreover, as heretofore stated, the proper construction, interpretation, and effect of a State statute, being a question of local law and not Federal law, the judgment of the State Court thereon will not be reviewed by the Supreme Court of the United States. See authorities cited on page 8.

Applying these principles to this case, the judgment of the State Court rests on adequate and independent State grounds in that the State Court has entered judgment, the effect of which is to hold that Petitioners' suit is barred by the terms of House Bill 309, Article 842(g), Vernon's Texas Civil Statutes, and Article 5527, Vernon's Texas Civil Statutes, and by laches and stale demand, all of which embrace, exclusively, State or local law, and the construction and application thereof will be followed by the United States Supreme Court.

We therefore respectfully submit that the judgment of the State Court rests on adequate and independent State grounds, and that the proper construction, interpretation and effect of State statutes and the decisions of State Courts as applied to this case is not subject to review by the Supreme Court of the United States.

Conclusion

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Court of Civil Appeals for the Third

Supreme Judicial District of Texas, in which the Supreme Court of Texas refused application for writ of error, should be by this Court denied.

Respectfully submitted,

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Service

I, HOWARD W. MAYS, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Answer and Brief has been forwarded by the United States Air Mail, postage prepaid, to Petitioners' attorneys, Mr. Dan Moody, Capital National Bank Building, Austin, Texas; Mr. Wharton Weems, Esperson Building, Houston 2, Texas; and Mr. Fred W. Moore, 1812 South Coast Building, Houston 2, Texas.

HOWARD W. MAYS
Assistant Attorney General
of Texas

Appendix A

Mrs. M. B. BUFORD et al., Appellants,

v.

STATE of Texas, Appellee.

No. 10631.

Court of Civil Appeals of Texas.

Austin.

Jan. 28, 1959.

Rehearing Denied March 4, 1959.

ARCHER, Chief Justice.

This is an appeal from an order of the District Court sustaining defendant's special exceptions numbered 1, 2, 3, 4 and 5, and overruling the special exceptions of plaintiffs. We will hereinafter set out the several exceptions in more detail.

This suit is on forty six One Thousand Dollar Texian Loan Bearer Bonds issued by the State of Texas under an Act of the Legislature, approved April 8, 1861, the bonds being payable to bearer July 1, 1877, with interest at 8% per annum from July 1, 1862 until paid. The bonds are all dated January 1, 1862, except bond No. 5 which is dated March 25, 1862.

Appellants as plaintiffs alleged that they are the owners and holders of forty six One Thousand Dol-

lar Texian Loan Bearer Bonds issued under an Act of the Texas Legislature, approved April 8, 1861, payable and due July 1877, with interest coupons for January 1, 1863, July 1, 1863, January 1, 1864, July 1, 1864 and January 1, 1865 which were clipped; that all the bonds were duly registered by the State Comptroller and the State is liable for the payment of the bonds.

That by House Concurrent Resolution No. 44, passed by the 55th Legislature, Regular Session, 1957, p. 1585, approved by the Governor and filed with the Secretary of State June 12, 1957, plaintiffs were authorized to file this suit at any time within two years from the effective date of the resolution, and that the suit is limited for the principal amount of said bonds and interest to the maturity date of the bonds and prayed for judgment.

The Special Exceptions filed by the State, as defendant are:

> "(1) * * * that Plaintiffs' suit was not filed in the time and manner provided by law; namely; namely, House Bill 309, Chapter 392 of the Acts of the 52nd Legislature, Regular Session, 1951, Page 677 (Article 842g, Vernon's Civil Statutes), which provides, in part, as follows:
>
> "'Section 1. The consent of the Legislature of the State of Texas is hereby given to all lawful holders of bonds issued under the Act of April 8, 1861, their executors, administrators and heirs to file and prosecute suit against the State of Texas, Comptroller of Public Accounts and the State Treasurer for moneys alleged to be due in unpaid principal and interest on said bonds * * *

"'Sec. 2. Said suit shall be brought in Travis County at any time within two (2) years from the date of this Act.' * * *

"(2) The Defendant, State of Texas, excepts to Plaintiffs' original petition in that it affirmatively appears therefrom that Plaintiffs' suit was not filed in the time and manner provided by Article 5527, Vernon's Civil Statutes, which provides, in part, as follows:

"There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

"'1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.'

"and that Plaintiffs' suit and cause of action, if any they have, was at the time of filing of Plaintiffs' original petition barred by the express terms of said statute in that it was not filed within four years from the date the same accrued.

"(3) The Defendant, State of Texas, excepts to Plaintiffs' original petition in that it affirmatively appears therefrom that Plaintiffs and any under whom they may claim have silently stood by and have wholly failed either to give notice or make demand upon the Defendants, State of Texas, or any officer or agent thereof charged with any official duty in connection with said bonds for approximately 75 years, and nowhere do Plaintiffs allege that said bonds were ever presented for payment at maturity or thereafter to the State of Texas or any officer or agent thereof charged with any official duty in connection with said bonds, and under

the circumstances Plaintiffs are guilty of laches and are not now entitled to prosecute their claim for recovery upon said bonds; to render any judgment therefor and to pay the same would be contrary to and in violation of the public policy of this State, the presumption being that the State of Texas will pay promptly all valid and legal obligations of the State or make provisions therefor.

"(4) The Defendant, State of Texas, specially excepts to Plaintiffs' original petition in that it affirmatively appears therefrom that Plaintiffs are now endeavoring to enforce a stale demand against the State of Texas, it affirmatively appearing that said bonds matured more than 75 years past and Plaintiffs are now in law and equity estopped from presenting and prosecuting said suit against the State of Texas upon said stale demand, the presumption being that if valid they would have long since been paid or provision made therefor.

"Wherefore, the Defendant, State of Texas, prays that the foregoing exceptions and each of them be sustained and this suit be by the Court dismissed.

"(5) Without waiving the foregoing exceptions the Defendant specially excepts to the sufficiency of Plaintiffs' petition in that it nowhere alleges when and how and under what circumstances Jeff Chapman, under whom Plaintiffs purport to hold said bonds, acquired or came into possession of them. In this connection the Defendant, State of Texas, will show the Court that Jeff Chapman was not born until several years after the maturity date of said bonds. Without this information, which is particularly within the knowledge of Plaintiffs,

the Defendant is not able to properly prepare for the trial of this case. Plaintiffs should, therefore, be required to amend their pleading to disclose said information, failing in which Plaintiffs' suit should be dismissed."

An answer subject to the plea to the jurisdiction and special exceptions, was a general denial and that Concurrent Resolution No. 44 is unconstitutional and void and violates Section 3 of Article I of the Constitution, Vernon's Ann. St.; and suit was not brought in accordance with House Bill No. 309, and is barred by the four year statute of limitation and that the bonds were issued after the State had seceded and was a member of the Confederacy and for the purpose of financing the war, and pled Section 4 of the Fourteenth Amendment. Further answer was that Ordinance No. 2, 5 Gammel Laws 887 (1898) provided in part that all debts created in aid of the late war were declared void, and that the Legislature was forbidden to make any provision for the payment of any debts so contracted from the 28th of January, 1861 until the 5th day of August, 1865, and further pled Ordinance No. 9, 5 Gammel Laws of Texas 894, passed on March 27, 1866, and pled other constitutional inhibitions, and that plaintiffs are guilty of laches and are estopped to prosecute the demand.

Plaintiffs by supplemental petition alleged that the granting of the right to sue by Resolution No. 44 the State did not create or destroy any rights in the State but waived the immunity against suit, and gave plaintiffs no cause of action that did not exist

by virtue of a contract of the State; that the defense of limitation or laches is not available to the State and that Article 842g, V.A.C.S. is not applicable and that the ordinances pled by the State have no effect as law, but are the wishes of certain persons and matters of opinion; that the bonds are negotiable instruments and import a valuable consideration, and were not appropriations for private purpose and are not barred; that the arbiter's reports are void; and lodged a general denial.

A similar suit to this one was filed September 20, 1954 by the same parties in the 11th District Court of Harris County, with like allegations, but claiming the right to sue by virtue of House Concurrent Resolution No. 118. Laws 1953, p. 1155. Similar answers to those in the present suit were filed. The suit was dismissed on motion of plaintiffs on July 22, 1957.

Since the court sustained the exceptions hereinabove set out we have not stated the pleadings more in detail but have given attention to such pleadings and have set out in brief a substantial resume of such pleadings.

The appeal is based on ten points and are to the effect that Article 842g enacted in 1951 was of such nature as not to grant permission to sue; that Resolution No. 118 adopted by the 53rd Legislature in 1953 was unconstitutional on its face; that House Concurrent Resolution No. 44, effective June 11, 1957, is as binding as a statute and lawfully granted permission to sue the State; that the State can only plead limitations subsequent to June 11, 1957;

that laches follow the law; that the bonds are payable to the bearer and are negotiable instruments; that the ordinance of 1866 invalidating debts contracted by the Confederacy, with reference to adjusting and funding the State debt are in violation of Section 10, Article I of the Federal Constitution; that the issuance of the bonds are not in violation of Section 44, Article III of the Texas Constitution; that the bonds do not represent a debt incurred in aid of the Rebellion against the United States; and finally that the Fourteenth Amendment to the Federal Constitution was unlawfully adopted by the various states and is void.

Appellants contend that Article 842g granted no permission to sue, because of the phrase "prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States government for the principal and interest on said bonds" since none of the bonds here involved were reimbursed in whole or in part.

The further position of appellants is that Resolution No. 118 was unconstitutional on its face because of the phrase "in like manner as similar suits instituted against private corporations are tried."

Martin v. Sheppard, 145 Tex. 639, 201 S.W. 2d 810 is cited.

The further contention is that House Concurrent Resolution No. 44 particularly provided for rights and remedies to be cumulative and is as binding as a statute and is not in violation of Section 3 of Article I of the Texas Constitution and Section XIV of the U. S. Constitution and cite a number of cases

such as *Duke Power Co. v. South Carolina Tax Commission*, 4 Cir., 81 F.2d 513; 298 U.S. 669, 56 S. Ct. 834, 80 L. Ed. 1392; *Martin v. Sheppard, supra*, and cases cited therein; *State v. Elliott*, Tex.Civ.App., 212 S.W. 695, er. ref.; *State v. Isbell*, Tex. Comm. App., 127 Tex. 399, 94 S.W.2d 423.

Appellee makes six counterpoints contending that the court did not err in sustaining its Special Exceptions Nos. 1, 2, 3, 4, and 5 which we have hereinabove set out.

[1] We do not believe the court erred in sustaining the first five of the special exceptions and in overruling appellee's plea to the jurisdiction of the court, and appellants declining to amend, dismissed the cause of action.

The first special exception was that plaintiff's suit was not filed in the time and manner provided by House Bill 309 (Article 842g, V.A.C.S.) enacted in 1951, providing that suit shall be brought within two years from the date of the Act, and plaintiffs' cause of action, if any, was barred by the express terms of the statute, and special exception No. 2 was that plaintiffs' suit was not filed in the time provided by Article 5527, V.A.C.S., the four year statute of limitation.

In 1951 the Legislature passed House Bill 309, codified as Article 842g, which in brief and in part provided that lawful holders of bonds issued under the Act of April 8, 1861, called Texian Loan, consent to sue on said bonds, principal and interest, and providing that the statute of limitations was not tolled, or admission of liability, and providing that

suit be brought in Travis County within two years from date of the Act.

This bill became effective September 7, 1951. Appellants' suit was filed July 31, 1957, and the trial court held that the bill applied to appellants and the bonds sued on, and that their suit was barred as a matter of law.

The defense of limitation is available to the State. *Callahan v. Giles*, 137 Tex. 571, 155 S.W.2d 793, and cases cited therein; *Railroad Commission v. Beacon Oil & Refining Co.*, Tex.Civ.App., 227 S.W. 2d 293, er. ref., N.R.E., and authorities and cases cited therein

Appellants' cause of action is found on a contract with the State and such cause, if such there be, accrued on July 1, 1877, and suit was filed approximately 80 years later and is barred by the four year statute of limitation. Section 6 of House Bill 309 provided that the statute of limitations was not tolled, or such cause revived if same was barred by the statute of limitations.

In relinquishing its sovereign immunity to be sued the State may attach such conditions to the right as it deems appropriate.

38 Tex. Jur., Section 35, p. 856.

[2] House Concurrent Resolution No. 44, by the terms of which appellants seek to maintain their suit and avoid the application of general law by resolution is not effective for this purpose, as statutes cannot be amended in this manner. An amendment of a law must be re-enacted and cannot be amended by a resolution.

Caples v. Cole, 129 Tex. 370, 102 S.W. 2d 173, 104 S.W. 2d 3; *State Highway Dept. v. Gorham*, 139 Tex. 361, 162 S.W. 2d 934; *Humble Oil & Refining Co. v. State*, Tex. Civ. App., 104 S.W. 2d 174, er. ref.

Concurrent Resolution No. 44, under which this suit was filed, provides:

> "Whereas, The Fifty-second Legislature of the State of Texas duly enacted an Act set forth as House Bill No. 309, Chapter 392, Page 677 of the 1951 General Laws of Texas, which Act is also Article 842g of Vernon's Texas Civil Statutes wherein the State authorized suit on bonds comprising said Texian Loan to a limited extent, that is for the moneys alleged to be in unpaid principal and interest on said bonds, prorated to the extent only of the amount reimbursed to the State of Texas by the United States Government, which the said Mrs. M. B. Buford and said Administrator contend did not apply to the bonds they hold and which they are unable to prove, such a requirement placing a burden on the bondholders that was no part of the original obligation and therefore said parties were prevented from asserting their rights as bondholders under said Article 842g; and
>
> "Whereas, The Fifty-third Legislature, at its Regular Session, by House Concurrent Resolution No. 118, duly adopted by the House and Senate of the Texas Legislature at said Session and approved June 8, 1953, did authorize the said Mrs. M. B. Buford and the said George B. Lindler, Administrator, to file suit on the bonds just above referred to, but specified in said Resolution that said suit should be tried 'in like manner as similar suits instituted against pri-

vate corporations are tried' which provision is unlawful and has been held to invalidate such Resolutions in other cases by the Supreme Court of Texas, and therefore, the said Mrs. M. B. Buford and the said George B. Lindler, Administra or, have not been able to properly maintain their suit, and it is the intention of the State of Texas to give said proper parties the opportunity to press their suit as bondholders without the limitations referred to, this Resolution being in addition to said Act and said Resolution, and any and all other Acts and Resolutions pertaining to the subject matter hereof; now, therefore, be it

"Resolved * * * That the said Mrs. M. B. Buford, her heirs, executors, administrators and assigns and George B. Lindler, Administrator of the Estate of Jeff Chapman, deceased, and his successors are hereby authorized to file, prosecute and maintain a suit * * *

* * * * * *

"Resolved, That the permission and authority granted by this Resolution be in nowise restricted or circumscribed except by the terms hereof; and, be it further

"Resovled, That the sole purpose of this Resolution is to grant permission to the aforesaid Mrs. M. B. Buford, her heirs, executors, administrators and assigns and/or George B. Lindler, Administrator, to bring suit against the State of Texas, and, no admission of liability of the State or of any fact is made in any way by the passage of this Resolution, and it is specifically provided that the facts upon which recovery is sought must be proved in court as in other civil cases."

Special Exceptions Nos. 3 and 4 are directed to laches and estoppel.

It appears from the pleadings that no demand was made for payment of the bonds for more than 75 years and they are, as a matter of law, guilty of laches and are estopped from prosecuting this suit.

Generally laches is a defensive plea but as above stated, the petition shows such a long delay in making demand for the payment of the bonds, and the plea of laches may be raised by special exception.

In Texas Jurisprudence, 10 Year Supplement, Vol. 6, paragraph 14a (New), p. 758, it is stated:

> "Effect of Court Rule.—Rule 94 of the Texas Rules of Civil Procedure provides that the defense of laches 'shall be set forth affirmatively.' This rule does not preclude the raising of the defense by special exception where it affirmatively appears from the allegations of the petition that the defense of laches is available. * * *"

Power v. State, 41 Tex. 102; *Culver v. Pickens*, 142 Tex. 87, 176 S.W. 2d 167.

In 27 Tex. Jur., Secs. 2-3, pp. 15-18, laches and stale demand are discussed.

Francis R. Lubbock, while Governor, signed the bonds on January 1, 1862, and was elected State Treasurer in 1878, serving until January 1891, and was familiar with the bonds and the maturity date, and if the holders of the bonds thought that they had a valid claim against the State, it may be assumed that the bonds would have been presented

for payment, and if payment had been wrongfully refused, the holders had the remedy of mandamus. Article 1735, V.A.C.S.

The Legislature met every two years subsequent to the maturity date of the bonds and if the bonds were valid, they could have paid them or made provisions for payment.

Then too, in Governor Hubbard's initial message to the 16th Legislature on the State's finances stating the bonded indebtedness, these bonds are not mentioned but a list of other bonds is given. Appendix "B", General Laws of Texas, 1876, pp 40-43.

Since we are affirming the judgment of the court in sustaining appellee's special exceptions 1, 2, 3, and 4 and dismissing this cause, we do not find it necessary to consider or decide whether the Constitutions of 1866 and 1869 invalidating these bonds were right or wrong, or whether any contract has been impaired, or to decide whether the Fourteenth Amendment to the Federal Constitution was legally adopted, and its application to these bonds.

The judgment of the Trial Court is affirmed.

Affirmed.

HUGHES, Justice (concurring).

I withdraw my former concurring opinion and substitute therefor the following:

Secs. 1 and 2, Art. 842g, V.A.C.S., provide:

> "Section 1. The consent of the Legislature of the State of Texas is hereby given to all lawful holders of bonds issued under the Act of April 8, 1861, their executors, administrators and

heirs to file and prosecute suit against the State of Texas, Comptroller of Public Accounts and the State Treasurer for moneys alleged to be due in unpaid principal and interest on said bonds prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States government for the principal and interest on said bonds.

"Sec. 2. Said suit shall be brought in Travis County at any time within two (2) years from the date of this Act."

Appellants construe the latter portion of this Section as meaning "that the bondholders could recover *only* to the extent of the actual reimbursement, properly prorated." They then contend that they could not have recovered anything in a suit brought under that statute "* * * because the United States government never reimbursed the State of Texas for the bonds in question. * * *" This fact, no reimbursement, they say is true as a matter of law since there is in existence no Act of Congress authorizing such reimbursement.

The State places a different construction on the latter portion of Sec. 1, *supra*, as shown by the following quotation from its brief:

"But Appellants say that House Bill 309, the General Law giving all holders of bonds, such as Appellants in this case, the right to sue upon said bonds, does not apply to them or their bonds. They advance the theory that the phrase 'prorated to the extent only of the amount hereto-

1. Appellants' suit was filed July 31, 1957.

fore reimbursed to the State of Texas by the United States Government for the principal and interest on said bonds' excludes them and their bonds from the application of House Bill 309, the General Law. The argument is wholly untenable. We think it clear that the Legislature meant that if any of the bonds had been reimbursed to the State of Texas by the Federal Government only to that extent would the bonds be subject to a proration. In other words, the State's liability would be reduced to the extent of such proration. Of course, if there were no bonds reimbursed by the Federal Government, this provision would have no application. If Appellants were entitled to recovery at all, they would be entitled to full recovery in the absence of a proration. If a proration were shown it would be borne in common by all the bond holders, and not merely by Appellants' bonds."

I do not agree with either construction. In my opinion the proration provision of this Article constitutes a limitation on the amount of money which the Legislature would be authorized to appropriate for the payment of judgments obtained in suits filed under the Act and that it in no way lessened the right or duty of the holders of Texian bonds to bring suit within the time prescribed for the purpose of establishing the amount of principal and interest due on the bonds held by the owner.

The only cause of action which the holders of these bonds had was a suit to establish ownership of bonds and the amount due thereon. Money judgments against the State are not enforced by ordinary judicial process. Their payment is left up to

legislative discretion and when made is customarily by an appropriation of money for that purpose.

In view of this it is my opinion that the right to sue provisions of Art. 842g are separate, distinct and severable from its proration or payment restrictions. See *National Biscuit Company v. State*, 134 Tex. 293, 135 S.W. 2d 687, where an invalid appropriation to pay judgments obtained contained in a right to sue resolution was held severable.

[1] Appellant's cause of action accrued when consent to be sued was authorized by the State. *State v. Elliott*, Tex. Civ. App., 212 S.W. 695, writ refused. This is true, in my opinion, regardless of the attitude of the State towards payment of any judgment which might be obtained. The usual case is where the State has not indicated its policy towards payment. Litigants proceed on faith believing that the State will pay its just debts. Here the most that appears is that the State was mistaken in stating that it had received partial reimbursement from the United States Government for these bonds and restricting payment accordingly. The attitude of State on becoming aware of this mistake is clearly shown by the subsequent legislative history of this matter, referred to in the Court's opinion herein. H. C. R. 118, p. 1155, Acts 53rd Leg., Reg. Sess. 1953; H.C.R. 44, p. 1585, Acts 55th Leg., Reg. Sess. 1957. These resolutions, in my opinion, indicate that the Legislature would have authorized payment of judgments obtained under Art. 842g and would have withdrawn the restrictions which that Act imposed on payment. However this may be it is my opinion that appellants should have timely proceeded

under Art. 842g, obtained judgment and thereafter sought its payment through legislative processes.

I realize that this construction of the statute is somewhat strained but it is supported upon the following general principles:

> "A statute will not be construed so as to ascribe to the Legislature an intention of doing any unjust thing by its enactment, or of causing confusion thereby, if the statute is reasonably susceptible of a construction showing the Legislature's intention to have been otherwise." *State Highway Department v. Gorham*, 139 Tex. 361, 162 S.W. 2d 934, 936.
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> "* * * in case of conflict between two sections of an act, one section will not be held to repeal another unless such is the only construction that is permitted." Vol. 39 Tex. Jur., p. 142.
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> "* * * in construing a statute it frequently happens that a word or phrase must be added to, or eliminated from, a particular part or section in order to carry out the manifest intent, as disclosed by the entire enactment. In such circumstances, a word or phrase may be supplied or one term may be substituted for another, and repugnant superfluous or useless words and expressions may be disregarded." Vol. 39 Tex. Jur. p. 185.

My construction of the statute would be manifest if the words "payment to be" are inserted immediately before the word "prorated." This insertion is plainly justified under the above authorities.

Furthermore the ineffectiveness of this statute, if so it be, does not appear upon its face and is made to appear only upon the production of evidence.

When appellants say that, as a matter of law, they could not have recovered anything in a suit brought under Art. 842g I presume they mean that the court trying such suit would have found from his own judicial knowledge that no Act of Congress authorized reimbursement of these bonds.[2]

Judicial notice merely supplants the necessity of producing evidence of the fact to be established. In *Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U.S. 292, 57 S. Ct. 724, 729, 81 L. Ed. 1093[3] the Court said:

> "Moreover, notice [judicial] even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence." Citing Wigmore, Evidence, par. 2567, 1 Greenleaf, Evidence, 16th ed., p. 18. See also 31 C.J.S., Evidence, § 13, p. 519.

Since appellants did not try out the issues of law and fact which they now raise, in a timely suit brought under Art. 842g, *supra*, where such issues could have been adjudicated it is my opinion that the cause of action asserted here is barred by the terms of such statute unless validly waived by the State.

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2. Courts take judicial notice of the nonexistence of a public Act of Congress. *Ofield v. National Ben. Life Ins. Co.*, Tex. Civ. App., Texarkana, 293 S.W. 271.

3. This case also states that such evidence may be disputed. The validity of this statement is questioned by eminent authority. See Vol. 1, Sec. 154. McCormick and Ray, Texas Law of Evidence, 2nd ed.

4. Other possible issues which could have been there litigated are (1) The validity of the proration provision if its effect was to nullify the consent to sue (2) the effect to be given the failure to mention the proration provision in the Caption of the Act.

The fact that the period of limitation has run against assertion of a claim against the State would not prevent the State from waiving the bar of the statute. I quote from *Caldwell County v. Harbert*, 68 Tex. 321, loc. cit. 328, 4 S.W. 607, 612:

> "As before said, there can be no constitutional objection to the power of the legislature to require a municipal subdivision of the state, such as a county, to provide for and pay any just claim against it after the lapse of such time as would ordinarily bar the claim. That in favor of and against counties, limitation will run in the absence of some statute to the contrary, does not affect the question. The power of the state to recognize and pay a claim against itself after the lapse of any period of time can not be questioned on any constitutional ground; and the power of the legislature over counties in reference to such matters as only affect them as municipal subdivisions of the state through which local affairs are conducted, is just as broad."

See also *Limestone County v. Robbins*, 120 Tex. 341, 38 S.W. 2d 580; 53 C.J.S., Limitations of Actions, § 24, p. 959.

[2] If Art. 842g and the two concurrent legislative resolutions were of the same dignity it could be plausibly and convincingly argued, to me, that appellants' suit was not barred by limitations. Art. 842g however is a general law which cannot be amended or repealed by a concurrent legislative resolution. *Caples v. Cole*, 129 Tex. 370, 102 S.W. 2d 173, 104 S.W. 2d 3; *Humble Oil & Refining Com-*

pany v. State, Tex. Civ. App. Austin, 104 S.W. 2d 174, writ ref.

Since Art. 842g was invoked by the State as a defense in this suit it is my opinion that the Trial Court was bound to enforce this general law and to disregard the resolutions of the Legislature which were in conflict with it.

I express no opinion on any other question presented.

GRAY, Justice (concurring).

[1, 2] It is with some difficulty that I agree with the conclusion reached by the majority that Art. 842g bars a recovery by appellants. I do not agree with Chief Justice ARCHER that the defenses of laches and stale demand are available to the State here. I do agree that the issue of whether the cause of action is barred must be decided by the application of Art. 842g, and the Concurrent Resolution wherein the Legislature expressed its intent to relieve appellants of burdens imposed by Art. 842g. It cannot be questioned that the Legislature had the authority to suspend this law. Art. 1, Sec. 28, Texas Constitution. However Justice Hughes has held, correctly I think, that the concurrent resolution was not effective to suspend Art. 842g, a general law.

The Legislature had the right to prescribe the terms and conditions of the right to sue the State. 38 Tex. Jur., p. 660, Sec. 59. It also had authority to, but did not, prescribe the period of limitation applicable to the cause of action by allowing a reasonable time in which to bring the suit. 28 Tex. Jur., pp. 80 and 81, Secs. 6 and 7. Art. 842g meets these

requirements by giving parties two years within which to bring their suit. Thus a period within which the remedy must be pursued was fixed and that period was complete before this suit was filed. Art 842g and the joint resolution deal with the same general subject [that is the bonds in question] and it is our duty to harmonize them if possible. 39 Tex. Jur., pp. 252 and 253, Secs. 134 and 135. The joint resolution merely gave appellants a right to sue but it did not provide a remedy.

Unquestionably the joint resolution gave appellants the right to sue and thus the meaning and application of the general rule that their cause of action then accrued is presented. To me it appears that the only answer to such inquiry is that appellants' right to sue the State accrued with the right of all holders of Texian bonds under Art. 842g. However that right expired after two years and appellants were then without the right to sue the State and test the validity of their claim under any law as well as to have determined the question whether Art. 842g was a valid enactment and whether its provisions were applicable to their cause of action. We all agree that it was a valid statute and that its provisions are applicable to appellants' alleged cause of action. This being true and the time provided in the statute for bringing suit having expired the jurisdiction of the court to hear the cause had ceased. *Texas Mexican Ry. Co. v. Jarvis*, 80 Tex. 456, 15 S.W. 1089, 1091. Appellants then could not sue the State and test the statute, Art. 842g, except by consent as given by the joint resolution. However since their cause of action accrued under

the general law (Art. 842g) a recovery is barred by the State's plea of four years limitation.

My stated conclusions make it unnecessary to express my opinion on matters not specifically mentioned herein.

Appendix B

ART. 842g. VERNON'S TEXAS CIVIL STATUTES. SUITS ON BONDS ISSUED IN 1861

Section 1. The consent of the Legislature of the State of Texas is hereby given to all lawful holders of bonds issued under the Act of April 8, 1861, their executors, administrators and heirs to file and prosecute suit against the State of Texas, Comptroller of Public Accounts and the State Treasurer for moneys alleged to be due in unpaid principal and interest on said bonds prorated to the extent only of the amount heretofore reimbursed to the State of Texas by the United States government for the principal and interest on said bonds.

Sec. 2. Said suit shall be brought in Travis County at any time within two (2) years from the date of this Act.

Sec. 3. The State and said Comptroller and Treasurer may appeal from any judgment had thereby as provided by law without executing any bond and upon final judgment against said defendants, same shall be paid out of the General Funds of the State Treasury not otherwise appropriated.

Sec. 4. Service in the said cause shall be had by citing the Governor, Comptroller, Treasurer and Attorney General.

Sec. 5. The invalidity of any section, term or provision hereof shall not render invalid the remaining sections, terms and provisions hereof which would otherwise be valid.

Sec. 6. Nothing herein shall be construed as tolling the Statute of Limitations on such cause, or as reviving such cause if same is now barred by the Statute of Limitations.

Sec. 7. Nothing herein shall be construed as an admission of liability on the part of the State of Texas in such cause. Acts 1951, 52nd Leg., p. 677, ch. 392.

Appendix C

ART. 5527. VERNON'S TEXAS CIVIL STATUTES. WHAT ACTIONS BARRED IN FOUR YEARS

There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.